

VU Research Portal

Entering the Invisible College: Defeating Lawyers on Their Own Turf

Aalberts, T.E.; Boer, L.J.M.

published in

British Yearbook of International Law
2018

DOI (link to publisher)

[10.1093/bybil/bry016](https://doi.org/10.1093/bybil/bry016)

document version

Publisher's PDF, also known as Version of record

document license

Article 25fa Dutch Copyright Act

[Link to publication in VU Research Portal](#)

citation for published version (APA)

Aalberts, T. E., & Boer, L. J. M. (2018). Entering the Invisible College: Defeating Lawyers on Their Own Turf. *British Yearbook of International Law*, 87(1), 177-195. [bry016]. <https://doi.org/10.1093/bybil/bry016>

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

E-mail address:

vuresearchportal.ub@vu.nl

ENTERING THE INVISIBLE COLLEGE: DEFEATING LAWYERS ON THEIR OWN TURF

By TANJA AALBERTS AND LIANNE J M BOER *

I. INTRODUCTION

The fifth volume of the Chilcot Report describes the development of the legal advice provided by Lord Goldsmith to the British government on the legality of the invasion in Iraq. It tracks his change of mind from the view that UNSC Resolution 1441 did not authorise military action, to the ‘better view’¹ that no further resolution was needed to authorise military action. Some sixty pages into volume 5 of the Report, a remarkable exchange between Lord Goldsmith, Jack Straw and Sir Michael Wood is described.² It starts with a memo by Wood, who states there is ‘no doubt’ about the illegality of using force against Iraq, ‘without a further decision of the [Security] Council, and absent extraordinary circumstances (of which at present there is no sign)’.³ Five days later, and following a discussion with Wood on the subject,⁴ Straw responds in writing by saying, ‘I note your advice, but I do not accept it’.⁵ Both documents have been

* Tanja Aalberts is Professor of Law and Politics at the Department of Transnational Legal Studies at Vrije Universiteit Amsterdam, and Director of the Centre for the Politics of Transnational Law. Email t.e.aalberts@vu.nl. Dr LJM (Lianne) Boer is Assistant Professor of Transnational Legal Studies at Vrije Universiteit Amsterdam, and Research Fellow of the Centre for the Politics of Transnational Law. Email l.j.m.boer@vu.nl. All URLs are correct as of 30 June 2018.

¹ The Report of the Iraq Inquiry (Report of a Committee of Privy Counsellors), 6 July 2016, vol 5, Section 5, para 572. All sections of the Report are available at <http://webarchive.nationalarchives.gov.uk/20171123122743/http://www.iraqinquiry.org.uk/the-report/>.

² Ibid, paras 341–395.

³ M Wood, ‘Iraq: Legal Basis for Use of Force’, 24 January 2003, <http://webarchive.nationalarchives.gov.uk/20171123124035/http://www.iraqinquiry.org.uk/media/226676/2003-01-24-minute-wood-to-ps-fco-iraq-legal-basis-for-use-of-force-with-manuscript-comment-mcdonald-to-wood-28-january.pdf>, para 2.

⁴ Report, vol 5, Section 5, para 350.

⁵ Jack Straw to Michael Wood, ‘Iraq: Legal Basis for Use of Force’, 29 January 2003 <http://webarchive.nationalarchives.gov.uk/20171123123123/http://www.iraqinquiry.org.uk/media/218280/2003-01-29-Minute-Straw-to-Wood-Iraq-Legal-Basis-for-the-Use-of-Force.pdf#search=Iraq%3a%20Legal%20Basis%20for%20Use%20of%20Force>.

‘the subject of considerable interest by the Inquiry’,⁶ legal scholarship and public debate alike. Most academic discussion focuses on the legal justification for going to war against Iraq and whether Straw knowingly acted illegally.⁷ What we are interested in, instead, is how the legal advice by both Sir Michael Wood (as Legal Adviser in the Foreign and Commonwealth Office) and Lord Goldsmith (as Attorney General) is refused or rather refuted by Jack Straw (as the Foreign Secretary) on the basis of *legal* arguments. In other words, we are interested in how lawyers are defeated on their own turf. We analyse this exchange of memos against the background of the increasing legalisation of world politics, and consider what the Chilcot Inquiry reveals about the role and importance of the legal adviser as well as (the production of) legal knowledge within foreign policy. More specifically, we position these exchanges in the debate about the structural empowerment of legal advisers in the policy-making process as a result of the expansion of international law and the legalisation of international society. We argue that the exchange reveals a more dynamic relationship between law and politics than the ‘lawyering up’ argument suggests,⁸ as they demonstrate a simultaneous upgrading and downgrading of legal expertise.

In our discussion of Straw’s arguments, we show, first, how his substantive rejection of Wood’s advice downgrades legal knowledge as a specific kind of expertise: while Straw is, in his own words, ‘not, famously, an international lawyer’⁹, this does not preclude him from rejecting the legal advice given and engaging with and determining the substance of the law, using lawyers’ own instruments. While ‘I note your advice, but I do not accept it’ at face value seems a classic example of politics (or a politician) trumping law (or a lawyer), Straw cannot forego law altogether: he needs a legal justification to support his foreign policy objectives. This in itself is not very surprising, given the broader picture of the legalisation of world politics.¹⁰ What is more interesting is that Straw uses *legal* arguments to make his point: he substantively engages with those he disagrees with on questions of law, based on his own involvement in the negotiations of Resolution 1441. As a second manifestation of the law/politics interplay, we show how Straw’s outright rejection of legal advice would not only let law be trumped by politics, but be paramount to doing something one has been told is illegal. This means that Straw *has* to engage with Wood on the legal question. This

⁶ J Straw, Memorandum on Legal Advice, Supplementary to the Hearing on February 8, 2010, February 2010, para 13, <<http://webarchive.nationalarchives.gov.uk/20171123123957/http://www.iraqinquiry.org.uk/media/96018/2010-02-XX-Statement-Straw-2.pdf>>.

⁷ See also Henderson in this Symposium.

⁸ D Kennedy, ‘Challenging Expert Rule: The Politics of Global Governance’ (2005) 27 Sydney Law Review 5; FG Nuñez-Mietz, ‘Lawyering compliance with international law: Legal advisers in the “War on Terror”’ (2016) 1 European Journal of International Security 215.

⁹ Jack Straw, ‘Memorandum on Legal Advice’, para 18.

¹⁰ D Kennedy, *Of War and Law* (OUP 2006); F Kratochwil, *The Status of Law in World Society. Meditations on the Role and Rule of Law* (CUP 2014).

‘upgrades’, rather than ‘downplays’ legal knowledge: it elevates it to a position not attained by other kinds of expertise and expert advice. Finally, the permissibility of the use of force ultimately has to be stated by the Attorney General himself and cannot be Straw’s conclusion alone. Straw still depends on—and constitutionally needs—the Attorney General to decide that the legal argument can be made: he has the final say on the *legality* of the government’s decision.

If the role of legal advisers and their ‘legal appreciations’ in decision-making are part of the ‘secret life of international law’,¹¹ the Chilcot Inquiry provides a unique glimpse into the relationship between law and politics in foreign policy-making within the UK administration. However, insightful as this particular case is, it does not allow us to draw general conclusions on international law in foreign policy, precisely because of the particularities of different institutional systems, as well as those of this case.¹² What our analysis does reveal is that in order to say something meaningful about law’s ability to speak truth to power one needs to engage in micro-level sociological analysis. We show how law is (re)produced in the exchanges between the Foreign Secretary and his legal advisers. We elaborate on this argument by investigating three different ‘keys’ in which Straw’s arguments are set. We chose ‘key’ as a (musical) metaphor as it refers to that which has its own internal logic and range of possibilities; in our analysis, a particular mode of arguments. Straw makes use of three different keys: first, the uncertain ‘nature of international law’¹³ (section II.A), the negotiating history of Resolution 1441 (section II.B) and the status of legal advice as such, as well as vis-à-vis policy advice (section II.C). For each of these keys we can see movements back and forth, simultaneously downplaying and upgrading the role of legal knowledge and expertise. In section III we discuss what the unique look into this hidden and everyday life of international law tells us about the legal adviser’s capacity to speak law to power, and the relationship between rule and power in contemporary world society.

¹¹ D Bethlehem, ‘The Secret Life of International Law’ (2012) *Cambridge Journal of International and Comparative Law* 1.

¹² This is an important caveat as institutional structures and the organisation of the legal office differ significantly per country, impacting on the process of providing legal advice. See also various contributions to the special issues on the role of legal advisers in foreign policymaking in (1991) 2 *European Journal of International Law*; (2005) 23(1) *Wisconsin International Law Journal*; KM Manusama, ‘Between a Rock and a Hard Place: Providing Legal Advice on Military Action Against Iraq’ (2012) 42 *Netherlands Yearbook of International Law* 95; M Windsor, ‘Consigliere or Conscience? The Role of the Government Legal Advisor’ in J d’Aspremont *et al* (eds), *International Law as a Profession* (CUP 2017).

¹³ Sir Lawrence Freedman uses the same phrase when referring to this part of Straw’s argument. See the Transcript of evidence given by Ms Elizabeth Wilmschurst, 26 January 2010, <<http://webarchive.nationalarchives.gov.uk/20171123123029/http://www.iraqinquiry.org.uk/media/95214/2010-01-26-Transcript-Wilmschurst-S3.pdf>>, 8.

II. THE THREE KEYS OF STRAW'S ARGUMENT

The central legal question in the run up to the decision to invade Iraq revolved around whether Resolution 1441, read together with UNSC Resolutions 678 and 687, provided 'a sufficient basis in international law to justify military action' (the so-called revival theory) if 'Iraq continues not to comply'.¹⁴ While both Sir Michael Wood and Lord Goldsmith initially argued that Resolution 1441 did not authorise force, Jack Straw adheres to the revival theory, which was also adopted by the United States and the Dutch government.¹⁵ The starting point of our analysis is Straw's 'I note your advice, but I do not accept it', which comes as part of a chain of exchanges between Wood, Goldsmith and Straw as the main characters in this particular history (November 2002–February 2003).¹⁶ In the following we investigate the ways in which Jack Straw rejects the legal interpretation set out so unequivocally—at least in January 2003—by Sir Michael Wood. Rather than sticking to a chronological order, we use the aforementioned keys to analyse the arguments put forward by Straw to reject the advice by his legal adviser and to convince the Attorney General of the proper understanding of UNSC Resolution 1441: the nature of international law, the negotiating history of 1441, and the character of legal advice. We show how within each key there is a simultaneous upgrading and downplaying of legal expertise.

A. *The nature of international law*

The first key in which Straw sets his argument concerns the nature of international law. As a first step in his argument, he points out that international law is by nature more uncertain than domestic law. In his memorandum to Sir Michael Wood in January 2003, Straw starts by saying that even in domestic law, legal issues are often uncertain: 'even on apparently open and shut issues the originators of the advice offered to me accepted that there could be a different view, honestly and reasonably held'.¹⁷ In his view and 'experience',¹⁸ if this is the case in

¹⁴ Jack Straw to Michael Wood, 29 January 2003, 2.

¹⁵ Reviving the 'all necessary means' clause of UNSC Res 678. According to Straw 'there is a strong case to be made that UNSC Res 687, and everything which has happened since (assuming that Iraq continues not to comply), provides a sufficient basis in international law to justify military action'. Jack Straw to Michael Wood, 29 January 2003, 2 (emphasis added). See Henderson in this Symposium.

¹⁶ UNSC Res 1441 was adopted on 8 November 2002. Although Tony Blair also plays a crucial role in the decision-making and Chilcot Inquiry, within the timeframe considered by this article, the conversation involves first and foremost Straw, Wood and Goldsmith.

¹⁷ Jack Straw to Michael Wood, 29 January 2003, 1. It is reminiscent of the Lord Chancellor's response to a memorandum drafted by the Law Officers he received during the Suez Crisis, in which he refers to international law as "dynamic". See G Marston, 'Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government' (1988) 37 ICLQ 773, 792.

¹⁸ Straw refers here to his own experience with the request for extradition of Pinochet; see Jack Straw to Michael Wood, 29 January 2003, 1. See also Report, vol 5, Section 5, para 352.

domestic law, it applies even more strongly to international law, ‘an uncertain field [with] no international court for resolving such questions’.¹⁹ The question of the legality of force against Iraq in particular, ‘is an arguable one, capable of honestly and reasonably held differences of view’.²⁰ This honest and reasonable diversity of perspectives is repeated throughout the memorandum. In response to a question by Baroness Usha Prashar during the February 2010 hearings, Straw refers to these kinds of decisions as being ‘made internally without external determination’; that is to say, made by legal advisers and politicians in the absence of available international courts.²¹

Straw draws upon this ‘uncertainty’ argument to reject the ‘categorical nature of the advice’ provided by Wood.²² Given the nature of international law, how can Wood be so sure of his rejection of a particular legal interpretation? Concretely, the specific form this legal uncertainty takes with regard to Resolution 1441 is well known: contrary to Wood’s unequivocal memorandum of 24 January 2003, Straw argues there actually are ‘two views’²³ as to how to interpret Resolution 1441. Indeed, Dutch, US and Australian legal advisers have ‘take[n] the view that SCR 1441 provides legal sanction for military operations’.²⁴ His substantive disagreement with Wood lies in the fact that, in Straw’s words, ‘this is an uncertain area of law’.²⁵ At the same time, the uncertain nature or indeterminacy of international law surprisingly does not preclude Straw from identifying Wood’s ‘very categorical statement’ as being ‘frankly ... on any analysis, at the time, incorrect’.²⁶ This is confirmed, Straw points

¹⁹ Jack Straw to Michael Wood, 29 January 2003, 2. Wood, too, refers to the absence of courts within the international realm, but draws a different conclusion: ‘[a]s part of giving advice and the client accepting the advice, the absence of a court, I think, is a reason for being more scrupulous in adhering to the advice, because it cannot be tested. It is one thing for a lawyer to say, “Well, there is an argument here. Have a go. A court, a judge, will decide in the end”. It is quite different in the international system, where that’s usually not the case. You have a duty to the law, a duty to the system’. Transcript of evidence given by Sir Michael Wood, 26 January 2010, <<http://webarchive.nationalarchives.gov.uk/20171123122957/http://www.iraqinquiry.org.uk/media/95218/2010-01-26-Transcript-Wood-S1.pdf>>, 34. See also the transcript of evidence given by Sir Michael Wood and Ms Elizabeth Wilmshurst respectively on this “uncertain nature” of international law; *ibid*, 33; Transcript of evidence given by Elizabeth Wilmshurst, 26 January 2010, 8–9.

²⁰ Jack Straw to Michael Wood, 29 January 2003, 2. See also Report, vol 5, Section 5, paras 351–53. This formulation by Straw—the emphasis on honesty and reason—does suggest criticism of Wood’s professional ethics in interpreting international law. In his public hearing Wood recalls Straw telling him that he ‘was being very dogmatic and that international law was pretty vague and that he wasn’t used to people taking such a firm position’. Transcript of evidence given by Sir Michael Wood, 26 January 2010, 31.

²¹ Transcript of evidence given by Jack Straw, 8 February 2010, 26.

²² J Straw, ‘Memorandum on Legal Advice’, para 16.

²³ Transcript of evidence given by Jack Straw, 8 February 2010, 3.

²⁴ Jack Straw to Peter Goldsmith, 20 February 2003, <<http://webarchive.nationalarchives.gov.uk/20171123123643/http://www.iraqinquiry.org.uk/media/222617/2003-02-20-minute-straw-to-attorney-general-untitled.pdf>>.

²⁵ *Ibid*. The underlining is in the original minutes.

²⁶ Transcript of evidence given by Jack Straw, 8 February 2010, 18. We will return to this in section II.B below.

out, by the very fact that Wood himself set out *two* views in a December 2002 memorandum to Goldsmith.²⁷

Straw's phraseology here suggests that, in fact, determinate things may be said of international law; namely that two legal interpretations may be offered of the same Resolution. It simply cannot be the case that there is only one legal answer.²⁸ What is more, Straw's response on 6 February 2003 to Goldsmith's draft legal advice ends with the claim that 'the better interpretation' is that, given an assessment of 'material breach', '(possibly) a further UNMOVIC report' and a discussion of these findings in the Security Council, Resolution 1441 'revives' the authority to use force against Iraq.²⁹ Seemingly to deflect Goldsmith's possible argument that this is not necessarily the *better* interpretation, Straw adds, '[a]t the very least, this interpretation ... deserves to be given *the same weight* as a view which in effect hands [France, Russia and China] the very legal prize they failed to achieve in the negotiation of 1441'.³⁰

Apparently, this critical legal stance with regard to international law's inherent indeterminacy does not preclude Straw from being as categorical as Wood about what international law does and does not allow for with regard to other legal issues. For example, he is clear on the illegality of regime change, and on relying on self-defense and humanitarian intervention as grounds for using force against Iraq,³¹ noting specifically that 'in some areas ... international law is very clear'.³² He categorically rejects these other grounds as possible justifications for war and in this regard distances himself from the US legal advisers he previously invoked as experts on Resolution 1441.³³ The US position on regime change, Straw adds, 'I regarded as improper and also self-evidently

²⁷ As pointed out by Straw, see eg J Straw, 'Memorandum on Legal Advice', paras 15–17. It should be noted that the point here is not the well-known discussion about the dual role and 'perpetual dilemma' of legal advisers, who need to be both universalist and partisan in their outlook. That is to say, they need to balance, on the one hand, an objective assessment of the prevailing state of international law (which could—or should—include the full range of legal views with regard to a particular issue), with, on the other hand, a more partisan function of being the advocate of their Ministries' causes in terms of putting forward the best legal case in support of government policy. See also AD Watts, 'International Law and International Relations: United Kingdom Practice' (1991) 2 EJIL 157, 163. Usually these are presented as two subsequent roles in different phases of the policy-making process.

²⁸ This does not preclude Straw to argue later on, quite determinately, what the right interpretation of Resolution 1441 is (see section II.B below).

²⁹ Jack Straw to Peter Goldsmith, *Iraq: Second Resolution*, 6 February 2003, <<http://web.archive.nationalarchives.gov.uk/20171123124039/http://www.iraqinquiry.org.uk/media/76183/2003-02-06-Letter-Straw-to-Attorney-General-Iraq-Second-Resolution.pdf>>, 5.

³⁰ Ibid (emphasis added). See also Cathy Adams' views on this, as described in the Report, vol 5, Section 5, para 117.

³¹ See, eg, Jack Straw, 'Memorandum on Legal Advice', para 8.

³² Transcript of evidence given by Jack Straw, 8 February 2010, 8.

³³ Jack Straw to Peter Goldsmith, 20 February 2003.

unlawful ... in international law, I am afraid, that is not a good ground for intervention by other states'.³⁴ These statements about the nature of international law raise the question why Straw claims legal uncertainty in this area in the first place. Straw claims on the one hand that international law as whole is more uncertain than domestic law, and on the other hand that 'some areas [of] international law [are] very clear'.³⁵ In other words, there are different levels of (un)certainly in different legal (sub-)fields. Upon closer inspection, however, the claim of uncertainty not only opens up space for alternative views (including Straw's own as 'not an international lawyer'),³⁶ but also, paradoxically, the possibility that Wood, as a legal expert, is wrong by misunderstanding the nature of his own field: to be this categorical in his advice is simply impossible, given the nature of international law. Straw makes this point unequivocally in his Memorandum to Goldsmith, dated 6 February 2003, where he identifies

a paradox in the culture of government lawyers ... the less certain the law is, the more certain in their views they become ... [I]n issues of international law, my experience is of advice which is more dogmatic, even though the range of reasonable interpretations is almost always greater than in respect of domestic law.³⁷

This brings Straw to claim, most strongly in the hearings, that Wood was 'on any analysis, at the time, incorrect, because there was doubt, there was doubt publicly. There was doubt between international lawyers'.³⁸ Furthermore, identifying this doubt amongst other international lawyers and opening up the possibility of different 'honest and reasonable' interpretations, paves the way for Straw's argument on the better interpretation of international law, and the possibility of claiming—in spite of international law's uncertainty in this field—that Wood is wrong on a substantial level too. This is where the second key comes in. What we see happening

³⁴ Transcript of evidence given by Jack Straw, 21 January 2010, 17; see also Jack Straw, 'Memorandum on Legal Advice', para 8.

³⁵ Transcript of evidence given by Jack Straw, 8 February 2010, 8; see also the exchange between Sir Lawrence Freedman and Elizabeth Wilmshurst during the hearings: Transcript of evidence given by Elizabeth Wilmshurst, 26 January 2010, 8–9.

³⁶ See Jack Straw, 'Memorandum on Legal Advice', para 18.

³⁷ Jack Straw to Peter Goldsmith, 6 February 2003, 2. This in contrast to a perception that '[u]nlike the judge, the [legal] adviser is perfectly prepared to admit that legal rules are general and open-textured and leave much room for policy-choices'. M Koskeniemi, 'Between Commitment And Cynicism: Outline For A Theory Of International Law As Practice' in C Wickremasinghe (ed), *Collection Of Essays By Legal Advisers Of States Advisers Of International Organizations And In The Field Of International Law* (United Nations 1999) 517. When Koskeniemi subsequently suggests that, from the perspectives of the political colleagues, the adviser is often perceived as typically formalist with a narrow vision on foreign policy, this at face value seems a direct echo of Straw's objection. However, as we point out, the engagement here reveals a more intricate dynamic—not just law versus politics, or legal formalism versus political pragmatism, but rather an engaged discussion within and about the parameters of law and legal discourse itself.

³⁸ Transcript of evidence given by Jack Straw, 8 February 2010, 18; see also 47: 'I just happen to think that [the Attorney General] was correct in regarding the decision that he did come to in the end as the better view'.

in Straw's discussions with Wood and Godsmith, as well as in the 2010 hearings,³⁹ is a shift in argument from legal uncertainty to Straw's own involvement in the negotiations of 1441, working in tandem to contest Wood's claims.

B. Knowing the law

The second key in which Straw's argument is set revolves around the question of the 'correct' interpretation of Resolution 1441, and the extent to which negotiators 'have a say' in determining the meaning of these Resolutions.⁴⁰ It builds on his 'considerable knowledge'⁴¹ of the negotiating process (and thus meaning) of the Resolution as a ground for rejecting Wood's interpretation. The issue here is not so much that a politician rejects advice: politicians have been known to do so before, and we will return to this relationship between the politician and the legal advice he receives in the next section. More interesting is how Straw's counterargument works: the fact that he rejects Sir Michael Wood's legal advice *on substantive grounds*. He engages with the substantive legal argument about the interpretation of Resolutions 687 and 1441, suggesting that Wood's straightforward position about the illegality of using force against Iraq is wrong.

First, Straw claims that the Resolution simply *cannot* mean what Wood suggests it means, as it is literally not what the British delegation bargained. If Wood was right, and Resolution 1441 included the necessity of a second resolution, the 'negotiations would have been over in a week'.⁴² This is echoed in Tony Blair's evidence before the Inquiry, in which he clarifies that the 'instructions to our negotiators' were to avoid the suggestion of a second resolution being necessary.⁴³ On the one hand Straw emphasises the role of negotiations in the production of international law, and uses his participation during the negotiations as a basis for his better view of what it means. On the other hand, he denies that

³⁹ Compare Jack Straw to Michael Wood, 29 January 2003, 2, with Jack Straw to Peter Goldsmith, 6 February 2003, 2–3, and Transcript of evidence given by Jack Straw, 8 February 2010, 8–9.

⁴⁰ See also Henderson in this Symposium.

⁴¹ Transcript of evidence given by Jack Straw, 8 February 2010, 19. Another example of substantive engagement with legal advice may again be found in the Suez crisis, see Marston, 'Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government', 792–93.

⁴² Transcript of evidence given by Jack Straw, 8 February 2010, 42. '[H]ad we been ready to embed into the text of 1441 a requirement for a second resolution before any military action', he says, 'negotiations would have been swift and painless'. Jack Straw, Memorandum to the Iraq Inquiry, January 2010, <<http://webarchive.nationalarchives.gov.uk/20171123122901/http://www.iraqinquiry.org.uk/media/194013/2010-01-xx-statement-straw-1.pdf>>, para 50.

⁴³ Report, vol 5, Section 5, paras 305–306. In the Dutch inquiry by the Davids Commission, Prime Minister Balkenende makes a similar counterfactual argument (if this is what they meant, they would have formulated it as such). TE Aalberts, 'Forging International Order: Inquiring Iraq in the Netherlands' (2011) 42 Netherlands Yearbook of International Law 139.

this very fact means that the outcome is always a compromise, that you never get precisely what you bargained for and texts are often vague precisely in order to be able to reach an agreement in the first place.

Straw's argument is based on the part he played in the drafting of the Resolution, how he 'was immersed in the line-by-line negotiations of the Resolution, much of which was conducted capital to capital with P5 Foreign Ministers'.⁴⁴ He proceeds to detail how the negotiators were very much aware of the difference between 'assessed' and 'assessment', between 'decide' and 'consider', providing a dictionary definition of the latter.⁴⁵ In a supplementary memorandum to the Chilcot hearings in January 2010, he states: 'I had become so familiar with the negotiations on the drafts of 1441, and the final text, that I could almost recite its terms in my sleep'.⁴⁶ Similarly, in a subsequent supplementary memorandum Straw states he 'had lived and breathed the negotiation of 1441, and therefore had an intense appreciation of its negotiating history'.⁴⁷ Elsewhere, he states how the negotiations between the P5 took place over 'an extraordinary five-week period in which not just every phrase, but every word, and even the punctuation, was the subject of the closest debate and argument ... In that period I often spent hours each day in telephone calls with [other Foreign Ministers]'.⁴⁸ During the hearings, he explains that his view was based on 'having been involved in the negotiations, line by line, word by word, comma by comma'.⁴⁹

The words Straw uses, both in the hearings themselves as well as in the supplementary material he provides, are strongly suggestive of this deeper knowledge of the meaning of Resolution 1441: he talks of its punctuation, the difference between nouns and verbs (assessment and assessed), and 'reciting the terms of 1441 in his sleep'. This is a politician telling an international lawyer how a Security Council Resolution should be read for legal purposes.⁵⁰ It does not suffice to think of Straw's authority as deriving solely from his being in the political position of making the actual decision about whether to go to war.⁵¹ It also lies in his claim to 'know best' what international law says, based on his in-

⁴⁴ Jack Straw to Peter Goldsmith, 6 February 2003, 1.

⁴⁵ Ibid, 3-4.

⁴⁶ Jack Straw, Memorandum to the Iraq Inquiry, January 2010, para 50. Straw repeats this (paraphrasing the memorandum) during the hearings: Transcript of evidence given by Jack Straw, 21 January 2010, 70.

⁴⁷ Jack Straw, 'Memorandum on Legal Advice', para 18.

⁴⁸ Jack Straw, Memorandum to the Iraq Inquiry, January 2010, para 27.

⁴⁹ Transcript of evidence given by Jack Straw, 8 February 2010, 13.

⁵⁰ Though of course, Jack Straw *is* in fact a lawyer, something pointed out by Sir John Chilcott during the hearings of Elizabeth Wilmshurst. See Transcript of evidence given by Elizabeth Wilmshurst, 26 January 2010, 8.

⁵¹ See also the distinction between 'in authority' and 'an authority' discussed in section III below.

v involvement in and lived experience of the negotiations of Resolution 1441.⁵² In other words, he moves from a rejection of Wood's advice on the basis of the uncertain nature of international law, to its rejection on the basis of certain, privileged knowledge about its meaning: Straw is the one who knows what Resolution 1441 truly meant. This is reinforced by both Straw and Blair's claim that their interpretation is simply what the resolution *has to mean*. Straw's argument thus goes beyond pointing out Wood's erroneous claim to a definitive interpretation of international law, to claiming that Resolution 1441 can mean only one thing. It is worth quoting from one of the hearings of Straw in full:

[w]hat I was questioning was the categorical conclusion that he [Sir Michael Wood] came to. The fact of the matter was that, as of 24 January, I believed—and so did Sir Jeremy Greenstock and so did Secretary Powell and virtually everybody who negotiated 1441, including, as it turns out, the French Ambassador to Washington—that a second resolution would not be required if there were a continuing material breach by Iraq. I felt that I was entitled to say that.⁵³

This statement reveals a subtle move from rejecting Wood's statement as inappropriately categorical (first key) to rejecting it - categorically - as wrong based on Straw's certain knowledge of what the law means (second key). In other words, Straw is not just making a legal-technical point about him being aware of multiple interpretations being possible. After opening up the space for multiple interpretations, Straw is now closing it down by arguing the better interpretation and true meaning of the Resolution. Crucially, this was not just *his* individual reading, but a position shared with many others who were 'in the room'. This extends to the other permanent members of the Security Council who 'knew what it said and ... voted for it'.⁵⁴ In the same move, however, Straw immediately defers again to the Attorney General: '[this] was, of course, subject to a decision which the Attorney General, and he alone, would make', he says '[it] was a decision not for us but for the Attorney General'.⁵⁵ This brings us to the third and final key in which Straw sets his argument: the position of legal advice and legal advisers.

⁵² See also Transcript of evidence given by Jack Straw, 8 February 2010, 20.

⁵³ Ibid.

⁵⁴ Ibid, 41 and see generally 39–45. In his public hearing, Lord Goldsmith makes a similar statement (if still somewhat cautiously): '[i]n one sense, the wording is crystal clear, because these members of the Security Council, who know the difference between the word "decide" and "consider the situation", chose, I believe quite deliberately to use the words "consider the situation", and they could have said "decide" if that's what they meant'. Transcript of evidence given by Peter Goldsmith, 27 January 2010, <<http://webarchive.nationalarchives.gov.uk/20171123123129/http://www.iraqinquiry.org.uk/media/235686/2010-01-27-transcript-goldsmith-s1.pdf>>, 49.

⁵⁵ Transcript of evidence given by Jack Straw, 8 February 2010, 20–21.

C. Status of legal advice

Straw's experience in negotiating Resolution 1441 is a crucial part of his disagreement with Wood; at the same time, he claims that the 'final decision' on the law is to be made by the Attorney General. In combination with the claim made by both Straw and Blair that 1441 *could only have meant one thing* the entanglement of arguments appears to be complete. This is about Straw's own 'intense knowledge'⁵⁶ of 1441; yet, he moves the legal decision very much away from himself. What results is an extremely elusive argument, difficult to pin down at any one particular point simply because it constantly shifts back and forth between different modes of argument. In this section, we elaborate on Straw's arguments as they pertain to the nature of legal advice, as well as the position of legal advisers vis-à-vis political decision-makers. As became clear during the Chilcot hearings, and as Straw himself clarifies, the discussion between Straw, Wood and Goldsmith is not about whether a legal adviser may express disagreement with his government.⁵⁷ It does, however, bring to the fore the question of the role of legal advisers,⁵⁸ as well as the nature of legal advice. This point first emerges from Straw's response to Goldsmith, saying he 'believe[s] that officials should always offer their best advice', which does not exclude the possibility of 'Ministers ... rais[ing] legitimate questions about the advice they receive... [t]he full range of views ought to be reflected in the advice offered by our Legal Advisers'.⁵⁹ Seven years later, in his supplementary memorandum to the Chilcot Inquiry, Straw added that

[i]t would be wholly improper of any Minister to challenge, or not accept, [the] Attorney General[s] decision ... [b]ut we were not at that stage. It would surely be a novel, and fundamentally flawed, constitutional doctrine that a Minister was bound to accept any advice offered to him/her by a Department's Legal Adviser ... if there were reasonable grounds for taking a contrary view.⁶⁰

As also pointed out by Peevers in her contribution to this Symposium, Straw at this point presents himself as the 'authorised decision-maker, not the legal adviser'.⁶¹ Furthermore and crucially, he distinguishes between the status of legal advice given by the FCO lawyers versus that provided by the Attorney General. Whereas the first may be rejected, the

⁵⁶ Ibid, 8.

⁵⁷ As stated, for example, by Peter Goldsmith, 'Minute to Jack Straw', 3 February 2003, <<http://webarchive.nationalarchives.gov.uk/20171123123358/http://www.iraqinquiry.org.uk/media/218284/2003-02-03-minute-goldsmith-to-foreign-secretary-untitled.pdf>>. See also Minute by Jack Straw to Peter Goldsmith, 20 February 2003.

⁵⁸ Peter Goldsmith, 'Minute to Jack Straw', 3 February 2003.

⁵⁹ Minute by Jack Straw to Peter Goldsmith, 20 February 2003.

⁶⁰ Jack Straw, 'Memorandum on Legal Advice', para 19. See also Transcript of evidence given by Jack Straw, February 2010, 6.

⁶¹ See Peevers in this Symposium.

second, as ‘the ultimate and authoritative source of legal advice on international law [...] to the British government’,⁶² cannot be dismissed. This brings home the potential impact of the Attorney General advising *against* the use of force against Iraq.⁶³ However, as was shown in the previous section, apparently the FCO advice cannot be rejected outright either: Straw is engaging substantively with the legal questions involved. Moreover, as the Chilcot Inquiry reveals, neither does the Attorney General’s advice need to be accepted at any time or without further discussion.

With regard to Straw’s intervention with Sir Michael Wood’s advice, it seems that his substantive engagement with his legal advisers about the correct interpretation of Resolution 1441 is the only option he has if he wants to justify the UK’s course of action. To simply ignore the advice would be tantamount to doing something which he has been told is illegal: to ignore it is not simply to go against policy advice on, for example, health care regulations. It means doing something one is told to be against *the law*:

there isn’t any requirement—indeed the government would break down—that ministers have to accept what amounts in this case to *provisional* legal advice that is offered them, *any more than you have to accept policy advice*. What you have to be is fully responsible for the decision you make, *but I never, ever acted unlawfully at all*. I have always been extremely careful about the law, but that cannot exclude the possibility of having an honest debate with the lawyers...⁶⁴

The above statement suggests that Straw believes legal and policy advice are the same thing. However, as emphasised above, to ignore or reject legal advice means to engage in behaviour one has been told is illegal, which Straw acknowledges to be unfathomable in relation to any advice given by the Attorney General,⁶⁵ and which had been set out in a memorandum by Wood as being contrary to the UK Ministerial Code.⁶⁶ In that light, Straw’s statement that he ‘never, ever acted unlawfully at all’ makes sense: the theoretical possibility to reject legal advice may be there, but he has to affirm this never happened *in practice*. Here, again, we find a similar dynamic as the one described earlier: on the one hand, Straw downplays the significance of legal advice by equating it with policy advice; on the other hand, he confirms the special status of

⁶² Watts, ‘International Law and International Relations’, 159. In this regard, it should also be noted that the Attorney General and FCO advisers have a different formal position: whereas FCO advisers are civil servants to the government, the Attorney General formally is a Minister in the government. The latter thus is a political appointee but is nevertheless supposed to give independent legal advice (*ibid*; see also Manusama, ‘Between a Rock and a Hard Place’, 107).

⁶³ Report, vol 5, Section 5, para 140.

⁶⁴ Transcript of evidence given by Jack Straw, 8 February 2010, 25 (emphases added).

⁶⁵ Jack Straw, ‘Memorandum on Legal Advice’, para 19. See also Blair’s comment quoted in the Report, vol 5, Section 5, para 140.

⁶⁶ Note Michael Wood, *Untitled*, 15 October 2002, <<http://webarchive.nationalarchives.gov.uk/20171123122551/http://www.iraqinquiry.org.uk/media/76027/2002-10-15-Note-Wood-to-McDonald-Iraq.pdf>>, para 3.

law by immediately adding that 'he never acted unlawfully at all'. This jump between legal advice as merely one type of advice amongst others to (implicitly) acknowledging its special status is bridged by identifying particular versions of the legal advice as merely 'provisional'.⁶⁷

The constitutional importance of the Attorney General's advice also clarifies the importance Straw attaches to the timing of requesting it. Ultimately Straw still needs the Attorney General to agree with him. Whereas Lord Goldsmith, from November 2002 onwards, frequently requests an opportunity to give his advice, he can only provide his initial view (that the Security Council needs to determine material breach and needs to authorise the use of force)⁶⁸ informally.⁶⁹ Whereas Straw is interested to hear the Attorney General's views on the matter,⁷⁰ this is not yet a formal request for advice. While on 12 November they agree that a formal request for advice ('instructions')⁷¹ would be forwarded, this does not happen until much later. Remarkably, when instructions are issued by FCO on 9 December they contain an explicit statement that 'no advice is required now' (thus in effect entailing a request *not* to advise). Indeed, at several occasions in the subsequent months, including a meeting on 19 December 2002 with Downing Street officials, it is made explicit that Lord Goldsmith's advice is '*not* required now'. When Lord Goldsmith eventually forwards his advice to Blair on 14 January,⁷² the Prime Minister identifies it as being only a draft; there has not been a formal request yet, hence a formal advice cannot be issued.⁷³ It was not until 4 February that Lord Goldsmith was asked for 'urgent advice on a

⁶⁷ This is technically correct: until there is a formal request, all legal opinions by the Attorney General are not official and considered provisional Manusama, 'Between a Rock and a Hard Place', 107.

⁶⁸ Report, vol 5, Section 5, paras 15, 20, 22, 27, 30, 32. See also Michael Wood to Jack Straw, 'Iraq: Legal Position', 22 January 2003.

⁶⁹ Transcript of evidence given by Peter Goldsmith, 27 January 2010, 232 ('on two occasions I insisted on offering a view, even though it wasn't being asked for, to make sure the policy, as it were, took account of that').

⁷⁰ 'Iraq: Note of telephone conversation between the Foreign Secretary and the Attorney General', quoted in Report, vol 5, Section 5, para 13ff, notably para 21. In his testimony to the Inquiry, Jonathan Powell (chief of staff to the Prime Minister) also distinguishes between written advice and opinions that Lord Goldsmith expresses. See the Transcript of evidence given by Jonathan Powell, 18 January 2010, <<http://webarchive.nationalarchives.gov.uk/20171123122841/http://www.iraqinquiry.org.uk/media/95166/2010-01-18-Transcript-Powell-S1.pdf>>, 103-04.

⁷¹ In his testimony Lord Goldsmith explicitly wishes to elaborate on the word "instructions", 'because it could be completely misunderstood'. As he explains to the Inquiry, 'the way that [bar-risters] work... is you get instructions, which means a request to advise [which] comes through with the detail of the question and with the supporting materials ... [U]ntil I had had that, particularly the Foreign Office legal advisers' point of view, and been able to analyse that, I wasn't really in a position to give a definitive point of view'. Transcript of evidence given by Peter Goldsmith, 27 January 2010, 55-56.

⁷² The advice is in line with Goldsmith's initial view, ie assessment of material breach by the Security Council and an explicit authorisation to use force are necessary.

⁷³ 'I had not yet got to the stage of a formal request for advice and neither had he got to the point of formally giving it'. Tony Blair's Statement to the Iraq Inquiry, 14 January 2011, <<http://webarchive.nationalarchives.gov.uk/20171123123837/http://www.iraqinquiry.org.uk/media/229924/2011-01-14-statement-blair.pdf>>, 10. The draft advice was not forwarded to the cabinet.

second resolution'.⁷⁴ This is followed by a letter from Straw to the Attorney General, in which the former again refers the draft status of the advice of January 14 and asks Goldsmith to 'carefully consider my [Straw's] comments below before coming to a final conclusion'.⁷⁵ The delay in the request for Goldsmith's advice is, of course, one of the most important points emerging from the Chilcot report.⁷⁶ Furthermore, following his draft advice (with inconvenient content), it was proposed that Goldsmith would be presented with 'alternatives'; he is sent on a field-trip to United States to meet with UK ambassador Greenstock, as well as US representatives who were present at the negotiations about Resolution 1441.⁷⁷ The well-known result is that by 27 February the Attorney General declared that a 'reasonable case' can be made that a second resolution would not be necessary.⁷⁸

* * *

Retracing the process of decision-making and the role of legal advice within this process brings to the fore a telling discussion about what the relevant law says in parallel to the development of foreign policy. While at face value the whole process, and in particular its result, might seem a clear case of politics trumping law and dethroning the Attorney General as the highest authority on international law in the UK constitutional system, in the next section we argue that to read this solely as the instrumentalisation of law to justify politics is too facile a conclusion, and misses the more intricate dynamics in the production of legal knowledge as a justificatory practice at play in this case.

III. 'SPEAKING LAW TO POWER' AND LEGAL EXPERTS

In this final section, we consider what the Chilcot hearings and Report reveal about the role and importance of the legal adviser as well as how legal knowledge—and law itself—is (re)produced in these interactions. The role of the legal adviser has long been the subject of academic interest. Apart from numerous empirical analyses of their function within

⁷⁴ Report, vol 5, Section 5, para 416.

⁷⁵ Jack Straw to Peter Goldsmith, 6 February 2003, also quoted in Report, vol 5, Section 5, para 407.

⁷⁶ Report, vol 5, Section 5, paras 903–19. In light of all the references to the timing of Lord Goldsmith's advice within the final report of the Chilcot Inquiry itself, it is quite surprising the Inquiry concludes in para 49 that there is 'no evidence of a discussion about the right timing' unless one takes this very literally. In his testimony to the Inquiry, Wood also refers to the 'reluctance in some quarters to seek the Attorney's advice too early'. Transcript of evidence given by Sir Michael Wood, 26 January 2010, 40. Lord Goldsmith also testified that there had been several occasions where he had been 'discouraged from providing' his advice. Cited in Report, vol 5, Section 5, para 164. Also illustrative are Ms Adams instructions to Lord Goldsmith, as reflected in paras 121 and 240 of the Report, vol 5, Section 5.

⁷⁷ Report, vol 5, Section 5, para 201.

⁷⁸ Ibid, para 452–53.

government and (foreign) policymaking within different domestic contexts, more recently there is a growing interest within international legal theory and International Relations in theorising the role of (legal) expertise within world society: how has the expansion of international law and the legalisation of world politics impacted the identity and role of (legal) experts in global governance?⁷⁹

Generally, three imaginaries emerge from the literature.⁸⁰ Are lawyers an 'invisible college' as imagined by Oscar Schachter in the 1970s, as a distinct and privileged class of a unified international legal profession with access to a purer kind of knowledge and authority, and with the 'noblest function' to give '*la conscience juridique* ... specific meaning and effect', notwithstanding governmental ambivalence?⁸¹ Some forty years later, Martti Koskenniemi painted a very different picture of the international legal order, as one fragmented into ever more specialised and technicalised regimes, where there is no unified profession nor a determinate knowledge about the law. Moreover, lawyers are but one of the parties sitting around the table, and need to defend legal reasoning against other types of relevant expertise, with different vocabularies and logics for international decision-making. The disheartening result is that law invariably defers to the 'politics of expertise',⁸² and the power of law, as a special kind of expertise, diminishes. Straw's equation of legal and policy advice seems reminiscent of such a dynamic. In a third imaginary, David Kennedy rather suggests that lawyers have become powerful experts in an increasingly legalised world:

[a]lthough it is easy to think of international affairs as a rolling sea of politics over which we have managed to throw but a thin net of legal rules, in truth the situation today is more the reverse. ... Indeed, to say the world is covered in law is also to say we are increasingly governed by experts—*legal* experts.⁸³

In other words, lawyers—including notably government legal advisers—are among the experts who govern us within world society. The recent discussion on 'lawfare' (the use of law as a weapon, tactical ally or strategic asset) is only the most outspoken illustration of how law has become

⁷⁹ See also Windsor in this Symposium.

⁸⁰ A Leander and T Aalberts, 'Introduction: The Co-Constitution of Legal Expertise and International Security' (2013) 26 *Leiden Journal of International Law* 783.

⁸¹ O Schachter, 'The Invisible College of International Lawyers' (1977) 72 *Northwestern University Law Review* 217, 225, 226.

⁸² M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 10 ('[t]he law defers to the politics of expertise: for what might be 'reasonable' for an environmental expert is not what is 'reasonable' to a chemical manufacturer; what is 'optimal' to [a] development engineer is not what is optimal to the representative of an indigenous population; what is 'proportionate' to a humanitarian specialist is not necessarily what is proportionate to a military expert').

⁸³ Kennedy, 'Challenging Expert Rule: The Politics of Global Governance' (emphasis added), 5. See also WG Werner, 'The Politics of Expertise: Applying paradoxes of scientific expertise to international law' in M Ambrus *et al* (eds), *The Role of Experts in International Decision-Making: Advisors, Decision-Makers or Irrelevant?* (CUP 2014) pp 44–62.

an integrated part of world politics, a *sine qua non* for doing and justifying foreign policies and politics.⁸⁴ It is precisely international law's appearance of objectivity that makes it such a powerful tool for the pursuit and legitimisation of political objectives.⁸⁵ This imaginary suggests that law itself has become an instrument of war; that is to say, an instrument to legitimise the use of force in spite of its prohibition as one of the cornerstones of the international legal order.⁸⁶ Formulated like that, it seems that the third imaginary best captures the UK decision-making with regard to the war on Iraq in 2003.

At the same time, the picture of being governed by legal experts, and the conception of lawyerisation as the structural empowerment of legal advisers in the policymaking process,⁸⁷ fails to capture the dual dynamics of upgrading/downgrading of legal expertise we identified above: as a special kind of expert knowledge on the one hand, and just one kind of expert knowledge, on the other. Moreover, these views on the role of law and lawyers seem to suggest that legal knowledge is something produced by the legal expert (ie FCO Legal Adviser Wood and/or Attorney General Goldsmith) and presented to the client (identified by Lord Goldsmith as Prime Minister Blair)⁸⁸ as a full package, which the latter can either accept or reject. This brings to mind the famous anecdote of Madeleine Albright suggesting to Robin Cook 'to get new lawyers', ones who would tell her that a unilateral intervention in Kosovo would be legal.⁸⁹ Whereas Straw is also explicit in not accepting the legal advice he is presented with, this is only the start of what becomes an extensive discussion about the substance and character of the law, which not only pushes at the boundaries of law, but also raises questions as to who in fact is the legal expert and who can participate in producing that specific 'expert' kind of legal knowledge. As such, the Chilcot Inquiry does indeed provide a unique insight into the work done by FCO legal advisers and the Attorney General, as well as into the nature, limits and contestability of (their) legal expertise.

The legalisation of world politics for certain means that governments need to be able to justify their foreign policy making—and in particular decisions of high politics such as the waging of war—to be in accordance

⁸⁴ Kennedy, *Of War and Law*; WG Werner, 'The Curious Career of Lawfare' (2010) 43 Case Western Reserve Journal of International Law 61; P Vennesson and NM Rajkovic, 'The Transnational Politics of Warfare Accountability: Human Rights Watch versus the Israel Defense Forces' (2012) 26 International Relations 409; S Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (CUP 2014).

⁸⁵ SV Scott, *International Law in World Politics. An Introduction* (Lynne Rienner 2010) ch 7.

⁸⁶ Kennedy, *Of War and Law*.

⁸⁷ Nuñez-Mietz, 'Lawyering compliance with international law'.

⁸⁸ Transcript of evidence given by Peter Goldsmith, 27 January 2010, 67. In his public hearing a year later, Lord Turnbull objects to this narrowing of the clientele to the Prime Minister only, as this 'isn't a very good description of the importance of this advice'. Transcript of evidence given by Lord Turnbull, 25 January 2011, <<http://webarchive.nationalarchives.gov.uk/20171123122522/http://www.iraqinquiry.org.uk/media/234680/2011-01-25-transcript-turnbull-s2.pdf>>, 28.

⁸⁹ J Rubin, 'Countdown to a Very Personal War' *Financial Times* (30 September 2000).

with international law. By entering into the juridical field, governments have to accept 'the specific requirements of the juridical construction of the issue'.⁹⁰ This requires not only knowledge of the rules (*know-what*) but also the skills for engaging in legal argumentation (*know-how*). Yet within this framework it is entirely possible to impact both the legal interpretation and framing of a particular issue as well as to organise political practices so as to avoid liability.⁹¹ Indeed, it is a hallmark of a good lawyer that she can provide a valid legal argument for either position in a dispute.⁹² In this context it is not so extraordinary that Wood (is asked to) provide(s) different views on the necessity of obtaining a second resolution. Legal practice in general, and providing legal advice to the government in particular, can be conceived as a lawyerly 'craft', a term that nicely encompasses both the element of skilled use, the art or professional practice of doing law, *and* the element of legal strategising.⁹³

Within the framework of 'lawfare' and the discussion about 'lawyering up', government legal advisers become the crucial intermediaries in this interplay between politics and international law. In addition to highlighting the 'politics of international law', as well as foreign policy-making and international law as intermeshed practices rather than separate domains, this literature still assumes quite distinct roles for the people involved in this process. What is interesting about the Chilcot Inquiry is that it reveals how the status of legal knowledge and the role of the legal adviser varies throughout the discussion. Rather than just receiving, accepting and/or rejecting legal advice, Straw is actively entering into the juridical field through the three keys we identified. To paraphrase Koskeniemi, the Foreign Secretary has to 'commit' himself to international law and the technicalities of legal discourse in order for law to deliver its seal of legitimacy on political decisions as the cynical flipside of the power of law.⁹⁴ This requires, on the one hand, the lawyerly craft of developing the right legal argument. The craft can be executed by Straw as a non-international-lawyer too, or so he argues. One does not need to be an international lawyer to know what international law says or to understand how it is made and argued. Anyone who knows the rules of the game can provide

⁹⁰ P Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805, 831.

⁹¹ T Aalberts and T Gammeltoft-Hansen, 'Sovereignty Games, International Law and Politics' in T Aalberts and T Gammeltoft-Hansen (eds), *The Changing Practices of International Law* (CUP 2018).

⁹² As explained, for example, by Scott, *International Law in World Politics. An Introduction*, 138, fn 9.

⁹³ I Mann, 'The Disaggregated Law of Global Mass Surveillance' in T Aalberts and T Gammeltoft-Hansen (eds), *The Changing Practices of International Law* (CUP 2018), 146.

⁹⁴ This tension between commitment and cynicism in the work of legal advisers is insightfully discussed by Koskeniemi, 'Between Commitment And Cynicism'. While he identifies these qualifications with different perspectives (legal scholars versus political colleagues) on what legal advisers do, as inside and outside perspectives, we shift the focus to the Foreign Secretary and argue that a similar dynamic 'between commitment and cynicism' is at play in this case. Straw needs to take the legal game seriously in order for it to function as a legitimizing force for his foreign policy.

an ‘honest and reasonable’ legal argument, ie be an expert (‘an authority’) on international law. On the other hand, not everyone gets to say *definitively* (authoritatively) ‘what the law is’. While Straw can provide an expert opinion on the true meaning of Resolution 1441, as the Foreign Secretary he cannot rely on this very knowledge and expertise for the justification of his own foreign policy decisions. Straw needs the Attorney General to voice it from his position as an external legal authority, more specifically, as ‘the ultimate and authoritative source of legal advice on international law ... to the British government’ for law to do its justificatory job.⁹⁵ Thus, after securing that the legal advice has the right content, Straw needs someone ‘in authority’ to seal it off.⁹⁶

IV. CONCLUSION

We began this chapter with Straw’s infamous ‘I note your advice, but I do not accept it’. We have shown that it is too facile a conclusion to dismiss this as simply a matter of politics (a politician) trumping law (dismissing a lawyer). Rather, the image that emerges from the documents released by the Chilcot Inquiry is far more nuanced, complex and interesting. Straw bases his rejection on three arguments: first, he argues the uncertain nature of international law. Here, Straw states that international law on the use of force is more indeterminate than other areas of international law; hence, so is legal interpretation in this field. Moreover, Straw disagrees with Wood on the interpretation of Resolution 1441, for two reasons: first, Straw himself headed the negotiations on the UK side, and therefore has ‘insider knowledge’ of what it means. Secondly, the Resolution simply *cannot* mean what Wood says it does, because the UK negotiating team explicitly opposed such an outcome. The third and final dimension of Straw’s argument pertains to the status of legal advice: on the hand, he states that a Foreign Minister is not bound to accept FCO lawyers’ advice; on the other, he explicitly says that ‘he never acted unlawfully at all’. Straw thus takes himself in and out of the equation – in and out of the invisible college – when it comes to the legal advice that he is given. In one respect, this suggests that international lawyers are not the only ones eligible to be experts (‘an authority’) on international law. Others can provide equally valid—honest and reasonable—arguments, if they know the rules of the ‘legal game’. Those in power cannot function without legal truth, but who is/can be a legal expert to produce it is

⁹⁵ Watts, ‘International Law and International Relations’, 159. As the Davids Committee also notes, the role of the Attorney General in the course of the events changed from an independent legal adviser to an advocate for the government. Rapport Commissie van Onderzoek Besluitvorming Irak, Mr WJM Davids (chair), Boom Amsterdam (2010), 264.

⁹⁶ The distinction being ‘in authority’ vs being ‘an authority’ comes from RB Friedman, ‘On the Concept of Authority in Political Philosophy’ in J Raz (ed), *Authority* (New York University Press 1990) 56–91.

apparently less a matter of roles or education. In that sense, this entire episode could be read as that it is relatively easy to defeat lawyers on their own turf: others may even have better access to the meaning of the law, if they have lived the experience of its production. Based on his inside knowledge, Straw is able to ultimately get the legal advice he needs. This could lead to a very cynical view on law as handmaiden of politics. But there is more to it than just instrumentalism, as these documents also confirm the special status of law by the players involved. Time and again the importance of getting the green light from the relevant lawyers is confirmed; sometimes more, sometimes less explicitly so. After all, the Attorney General still needs to seal it off, and hence he needs to be persuaded of another reading of the law. Moreover, the controversy and public outcry surrounding the decision to invade Iraq suggests that the malleability of international law perhaps only goes so far.⁹⁷ Even though one may speak the ‘language’ of international law, there are limits to what can be sold as ‘an honest and reasonable’ legal argument.⁹⁸ The resignation of Elizabeth Wilmshurst, and her declaration that she ‘[could] not in conscience go along with advice... which asserts the legitimacy of military action’⁹⁹, should be read in that light. One can wonder, though, whether this ‘reasonableness’ of legal arguments is a quality inherent to international law itself, or whether it is decided by those engaged in the field.¹⁰⁰ ‘Speaking the law’—*juris dicere*¹⁰¹—is ultimately reserved to those in a position to do so.

⁹⁷ See also Peevers in this Symposium, who describes how Elizabeth Wilmshurst received a ‘standing ovation’ after her testimony to the Chilcot Inquiry.

⁹⁸ In the context of the US torture memos, this is reminiscent of the ‘permissible good-faith argument’, see RB Bilder and DF Vagts, ‘Speaking Law to Power: Lawyers and Torture’ (2004) 98 AJIL 689, 694.

⁹⁹ E Wilmshurst, ‘Wilmshurst Resignation Letter’ *BBC News* (24 March 2005) <http://news.bbc.co.uk/1/hi/uk_politics/4377605.stm>. For a discussion, see also S Samuel, ‘British Influences on the “Ideals” of International Lawyers’ in R McCorquodale and J-P Gauci (eds), *British Influences on International Law, 1915–2015* (Brill Nijhof 2016) 84–85.

¹⁰⁰ See also T Aalberts and I Venzke, ‘Moving Beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice’ in J d’Aspremont *et al* (eds), *International Law as a Profession* (CUP 2017) pp 287–10.

¹⁰¹ P Goodrich, ‘Disciplines and Jurisdictions: An Historical Note’ (2010) 48 English Language Notes 153, 154, 155; G Noll, ‘Theorizing Jurisdiction’ in A Orford, F Hoffmann and M Clark (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2017) 608, and section 4 of his chapter in general.